SCHOOL OF LAW
CASE WESTERN RESERVE UNIVERSITY

Canada-United States Law Journal

Volume 9 | Issue

Article 4

January 1985

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Erratum
article

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*by J. D. Wilson**

I. INTRODUCTION

The attorney-client privilege provides protection for communications made by a client to his counsel in pursuit of legal advice. When the client is a natural person, application of this simple formulation of the privilege presents no substantial difficulty. However, when the client is an artificial person, such as a corporation, specific difficulties may arise with regard to the identification of the client. Corporations must act and speak through agents. In terms of the application of the privilege to corporations, it thus becomes necessary to determine which agents are sufficiently identified with the corporation to give rise to a corporation's privilege.

The question of the corporate privilege has received much greater attention in the United States than it has in Canada. Generally speaking, American courts have attempted to limit corporate claims of privilege to communications from those employees superior enough in the corporate hierarchy that it may fairly be said that they identify the entity.[1] By contrast, Canadian courts have shown little concern about the risk of potentially overbroad corporate claims and have upheld such claims without inquiry into the position of the communicating employee.[2]

This article will examine the differing approaches between the U.S. and Canadian jurisdictions. In particular, this article will review American attempts to define the corporate privilege. The Canadian treatment of the privilege will also be considered in contrast to the American law.

The article begins with a brief discussion of the policy basis of the privilege and its elements both generally and as applied to corporations. The United States Supreme Court opinion in *Upjohn v. United States*[3] will then be considered to determine what rule, if any, now exists in the

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1 *See infra* text accompanying notes 24-26 and 31-33.

2 *See infra* text accompanying notes 97-98 and 101-102.

3 449 U.S. 383 (1981).

U.S. The status of the corporate privilege in Canada and England will then be critically compared to the American law. Finally, proposals for reform are discussed.

The article concludes that none of the tests currently employed for the privilege claims of corporations in either jurisdiction are wholly adequate because they either artificially limit the privilege or, in the case of the Anglo-Canadian jurisprudence, permit overbroad claims of protection. The article suggests two alternative tests which are superior to those currently in use. The preferred test would link the attachment of the privilege to the potential liability of the corporation. Under this test the corporation's privilege would arise with respect to employee communications when those communications involve discussion of events which may result in corporate liability.

The alternative test is based on agency concepts. According to this test the privilege would arise on behalf of the corporation when the communication with counsel is made or directed by an employee possessing actual authority to contract for legal services on behalf of the corporation. This test allows for reasonably certain application and contains natural disincentives to overbroad claims.[4]

II. POLICY AND ELEMENTS

The theory underlying the attorney-client privilege is that adequate representation is premised upon full and frank disclosure by the client.[5] The implicit fear addressed by the privilege is that if attorneys could be compelled to testify against their clients, clients would naturally be reticent to discuss the case, especially those facts interpreted by the client to be inculpatory.[6] Thus, it is reasoned that lack of protection could result in inadequate professional assessment of the facts, insufficient trial representation, and a possible finding of guilt or liability when a fully informed attorney may have been able to construct a viable defense.[7] Furthermore, outside the area of actual or contemplated litigation, lack of protection could deter future attempts at compliance with the law.[8] Concerns with compliance will often arise when executives believe employees have engaged in questionable conduct. Effecting compliance with the law will often require disclosure of such conduct to an attorney in order to obtain appropriate legal advice. If the resulting information

[4] It will be noted that this test is a modification of the subject matter test discussed *infra* notes 31-46 and accompanying text. However, it adds the additional, clarifying requirement of actual authority for the communicating or directing employee.

[5] *See Upjohn v. United States*, 449 U.S. at 390; Trammel v. United States, 445 U.S. 40, 51 (1980); Fisher v. United States, 425 U.S. 391, 403 (1976); Hunt v. Blackburn, 128 U.S. 464, 470 (1888); 8 J. WIGMORE, EVIDENCE § 2291, at 545 (McNaughton rev. 1961); R. CROSS, EVIDENCE 274 (1970).

[6] *See* 8 J. WIGMORE, *supra* note 5, § 2291, at 552-53.

[7] *Id.* at 546-47.

[8] *Id.* at 552.

in the hands of attorneys was discoverable, potential plaintiffs or prosecutors would gain an easy method for supporting claims against corporations. The resulting risk would discourage disclosure to attorneys and would thus thwart the giving of advice which may lead to compliance with the law.[9]

The above arguments in favor of the privilege must, however, be viewed in light of the competing policy consideration that all facts relevant to litigation should be disclosed.[10] The judicial pursuit of truth demands that all relevant information be placed before the trier of fact in order that correct decisions be made. The attorney-client privilege, however, allows the withholding of potentially relevant information, with the result that the probability of a correct outcome may be diminished. Implicit, therefore, in the recognition of the privilege is a policy decision that the cost of less correct decisions is outweighed by the benefit accruing to litigants invoking the privilege. Nonetheless, given the cost of the privilege and its status as an exception to the general rule of disclosure, the privilege is to be narrowly and strictly construed.[11] This rule creates specific difficulties when the privilege is applied to corporations. These difficulties will be discussed in detail later in this article.[12]

The most often cited formulation of the privilege is that proposed by Dean Wigmore. He suggested that the privilege would attach when the following conditions were met:

> (1) Where legal advice of any kind is sought (2) from a professional legal adviser in his capacity as such, (3) the communications relating to that purpose, (4) made in confidence (5) by the client, (6) are at his instance permanently protected (7) from disclosure by himself or by the legal adviser, (8) except the protection be waived.[13]

When the client is a natural person only limited difficulties arise in determining the existence of the privilege. On the other hand, when the client is a corporation problems may arise, especially with respect to elements (4) and (5). The main difficulty which will be addressed by this article is that of the identity of the corporate client.

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[9] *See* Diversified Industries v. Meredith, 572 F.2d 596, 606 (8th Cir. 1978) (Heaney, J., dissenting). Justice Heaney's views were adopted by the majority on a rehearing *en banc*. *Diversified Industries*, 572 F.2d at 608. In that case, which will be discussed in detail, *infra*, counsel was retained, *inter alia*, to advise on future compliance with the law. Heaney reasoned that to force disclosure of the attorney's report would deter future attempts at compliance through the assistance of counsel. *See also* Muller, *The Attorney-Client Privilege—Identifying the Corporate Client*, 48 FORDHAM L. REV. 1281, 1294 (1980).

[10] 8 J. WIGMORE, *supra* note 5, § 2292, at 555 n.2.

[11] Trammel v. United States, 445 U.S. 40, 50 (1980); United States v. Bryan, 339 U.S. 323, 331 (1950); 8 J. WIGMORE, *supra* note 5, § 2291, at 554; Note, *Evidence - Privileged Communications - The Attorney Client Privilege in a Corporate Setting: A Suggested Approach*, 69 MICH. L. REV. 360, 364 (1970).

[12] *See generally* Section III A. *infra*.

[13] 8 J. WIGMORE, *supra* note 5, § 2292, at 554.

A corporation can act and speak only through agents.[14] In the context of the attorney-client privilege, the question arises whether a particular agent has sufficient authority to personify the corporation when seeking legal advice. American cases have tended to narrow the range of persons who can give rise to the privilege on behalf of the corporation.[15] On the other hand, English and Canadian decisions have given an extremely wide scope to the corporate privilege, apparently assuming that any employee can give rise to a privileged communication so long as the other elements are met.[16] Each approach is analyzed below.

III. Application to Corporations - Who is the Client?

A. *The American Jurisprudence*

1. Before *Upjohn*

As noted above, the principal issue for dispute in the corporate attorney-client privilege is the extent of the area of protection. Recent American cases, at least until the decision in *Upjohn*,[17] exhibit a tendency to narrow the range of protection. Such decisions appear to be a reaction to the argument that, given the size of modern corporations and the frequency with which legal advisers are consulted by corporations, almost every communication could potentially attract the privilege to the detriment of the general rule of full discovery prior to litigation.[18] While issue is not taken with the argument that the privilege should not extend that far, this only eliminates one extreme of the continuum of possibilities. The other extreme, that the corporation should have no right to the privilege may also be eliminated. While this position has been argued,[19] *Upjohn* expressly recognized the corporate privilege.[20] The main issue is thus the balance to be struck between the extremes of no privilege and over-inclusive privilege. The cases and comments suggest a number of approaches to this balancing.

The principal case applying a narrow standard to the corporate privilege is *City of Philadelphia v. Westinghouse Electric Corp.*[21] In that case an attempt was made to discover statements made to counsel by employees of a co-defendant during preparation for litigation. Privilege was

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14 H. Henn, Law of Corporations 108 (2d ed. 1970).

15 *See infra* text accompanying notes 17-18, 21 and 24-25.

16 *See infra* text accompanying note 112.

17 449 U.S. 383 (1981).

18 *See* Simon, *The Attorney-Client Privilege as Applied to Corporations*, 65 Yale L.J. 953, 955 (1956); Note, *The Attorney-Client Privilege and the Corporate Client: Where Do We Go After Upjohn*, 81 Mich. L. Rev. 665, 667-68 (1983).

19 Gardner, *A Personal Privilege for Communications of Corporate Clients - Paradox or Public Policy?*, 40 U. Det. L.J. 299 (1963); Radiant Burners, Inc. v. American Gas Association, 207 F. Supp. 771 (N.D. Ill.), *mem. and order*, 209 F. Supp. 321 (N.D. Ill. 1962), *rev'd*, 320 F.2d 314 (7th Cir. 1963).

20 449 U.S. at 390.

21 210 F. Supp. 483 (E.D. Pa. 1962).

claimed on behalf of the corporation and the employees involved, although the latter claim was summarily rejected.[22] Judge Kirkpatrick also rejected the corporate claim, applying what became known as the control group test.[23] First, Judge Kirkpatrick rejected an argument based on *United States v. United Shoe Machinery Corp.*[24] that the privilege applied to all employee communications. The judge reasoned that such a standard was too wide and concluded that a corporation was entitled to the privilege only when the employee making the communication was so situated as to identify the corporation itself.[25] The following test was employed:

> [I]f the employee making the communication, of whatever rank he may be, is in a position to control or even to take a substantial part in a decision about any action which the corporation may take upon the advice of the attorney, or if he is an authorized member of a body or group which has that authority, then, in effect, he is (or personifies) the corporation when he makes his disclosure to the lawyer and the privilege would apply. In all other cases the employee would be merely giving information to the lawyer to enable the latter to advise those in the corporation having the authority to act or refrain from acting on the advice.[26]

Judge Kirkpatrick went on to state that the authority referred to in his test was actual authority.[27]

The decision in *Westinghouse Electric* can be easily criticized, although given the fact that it is no longer good law[28] little space need be exhausted in doing so. The test narrows the privilege to those communications originating from employees authorized to act upon the resulting legal advice. However, in many situations those possessing such power

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22 The employees had been informed that if their evidence revealed breaches of company policy this would be reported to management. On this fact it was held that the element of confidentiality was lacking and no privilege in favor of the individual employee could attach.

23 *Westinghouse Electric Corp.*, 210 F. Supp. at 485.

24 89 F. Supp. 357 (D. Mass. 1950). The argument arises from Judge Wyzanski's holding that the privilege applied with respect to information secured from an officer or employee where the other elements of the privilege were met. *Id.* at 361. Such elements were formulated as follows:

> The privilege applies only if (1) the asserted holder of the privilege is or sought to become a client; (2) the person to whom the communication was made (a) is a member of the bar of a court, or his subordinate and (b) in connection with this communication is acting as a lawyer; (3) the communication relates to a fact of which the attorney was informed (a) by his client (b) without the presence of strangers (c) for the purpose of securing primarily either (i) an opinion of law or (ii) legal services or (iii) assistance in some legal proceeding, and not (d) for the purpose of committing a crime or tort; and (4) the privilege has been (a) claimed and (b) not waived by the client.

Id. at 358-59.

25 *Westinghouse Electric Corp.*, 210 F. Supp. at 485.

26 *Id.*

27 *Id.*

28 The court in *Upjohn* rejects the "control group test." 449 U.S. at 397.

will not personally be in possession of the relevant facts.[29] The attorney is thus disadvantaged in gathering necessary information. If he consults with the lesser employee who has direct access to the evidence the disclosures will be subject to discovery. Conversely, if he consults only with control group members the information is likely to be second hand, thus impeding the lawyer's ability to judge credibility and to ask subsidiary questions which may arise more readily when directly confronting a witness.[30] The narrowness of the rule proposed in *Westinghouse Electric* not only defeats the policy of the privilege, but also impedes full disclosure from the best sources of evidence.

A broader test for the corporate privilege is the so-called subject matter test proposed in *Harper & Row v. Decker*,[31] a civil antitrust action. During a prior proceeding, employees of the petitioner and others had given evidence before a federal investigative grand jury. Subsequently, they were "debriefed" by counsel. Plaintiffs in the civil action sought disclosure of the attorney's memoranda of the debriefings and were met with a claim of privilege. The District Court rejected the claim, but was reversed on a mandamus application. In a *per curiam* opinion, the control group test formulated in *Philadelphia v. Westinghouse* and applied by the District Court was rejected as being overly narrow.[32] The following broader test was advocated in its place:

> We conclude that an employee of a corporation, though not a member of its control group, is sufficiently identified with the corporation so that his communication to the corporation's attorney is privileged where the employee makes the communication at the direction of his superiors in the corporation and where the subject matter upon which the attorney's advice is sought by the corporation and dealt with in the communication is the performance by the employee of the duties of his employment.[33]

Given that this test may permit attachment of a corporate privilege on communications from any employee, it is much broader than the control group test. However, two limitations on the privilege are relevant.

First, the communication, if made by a lesser employee, must be at the direction of his corporate supervisors.[34] What is meant by this is not clearly defined. For instance, must the directing superior be a member of the control group or merely superior to the communicating employee in the corporate hierarchy? At least one case has adopted the former point

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[29] *See id.* at 391; *Diversified Industries v. Meredith*, 572 F.2d at 608; Note, *supra* note 18, at 671; Weinschel, *Corporate Employee Interviews and the Attorney-Client Privilege*, 12 B.C. INDUS. & COM. L. REV. 873, 876 (1971).

[30] *See supra* note 28.

[31] 423 F.2d 487 (7th Cir. 1970), *aff'd per curiam by an equally divided court*, 400 U.S. 348 (1971).

[32] 423 F.2d at 491.

[33] *Id.* at 491-92.

[34] *Id.* at 490.

of view.[35] However, good arguments exist to the contrary. Compelling in itself is the language employed by the Seventh Circuit in *Harper & Row.* The court was well aware of the control group terminology yet declined to employ it, thus supporting an argument for a plain reading of the rule that the directing supervisor need not be a control group member.[36] This argument is strengthened somewhat by *Upjohn,* in which control group terminology was again shunned with reference only to "corporate superiors."[37] Common sense suggests a middle ground approach between the two extremes posited above. Many events giving rise to potential corporate liability may be of insufficient importance to involve a control group member in the action to be taken on legal advice.[38] On the other hand, a rule which makes every communication by every employee privileged will result in overly broad claims and runs counter to the fundamental rule that the privilege is to be construed narrowly and strictly.[39]

The second limitation in the *Harper & Row* test is that the communication must relate to the performance of the employee's duties.[40] This is an unobjectionable limitation because it prevents attachment of the privilege to information given by a mere witness rather than by a client. While the Seventh Circuit expressly declined to decide whether such

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[35] Duplan Corp. v. Deering Milliken, Inc., 397 F. Supp. 1146, 1163 (D.S.C. 1974).

[36] *Harper & Row,* 423 F.2d at 491.

[37] *Upjohn,* 449 U.S. at 394. *See also* In re Grand Jury Subpoenas dated Dec. 18, 1981 and Jan. 4, 1982, 561 F. Supp. 1247, 1253 (E.D.N.Y. 1982) in which *Upjohn* was interpreted to allow the privilege to attach regardless of the employee's position.

[38] Of course this depends on how "control group" is defined. In *Westinghouse Electric Corp.,* persons in a position to control or substantially take part in any action to be taken upon legal advice would be regarded as within the control group. *Id.* at 485. *See also* Natta v. Hogan, 392 F.2d 686, 692 (10th Cir. 1968). This potentially includes almost everyone in the corporation. For instance, if the advice concerned traffic safety it may be argued that the company dispatcher is within the control group where he is given a substantial role in determining the action to be taken upon the advice. This, however, is probably a rare situation. In most corporate situations the persons within the control group as defined in *Westinghouse Electric* will be relatively superior in the corporate hierarchy. Another hypothetical may illustrate potential difficulties with this. It may be acknowledged in corporate job descriptions that a particular member of the general counsel's office has responsibility for occupational health and safety, however regional managers have blanket authorization to consult with local attorneys regarding specific difficulties with no need to involve general counsel, but are not authorized to alter policy without approval. A minor accident occurs and the regional manager retains counsel who interviews all the involved employees. On these facts it could be persuasively argued that the privilege would not attach to the benefit of the corporation because the regional manager who directed the communications is not a control group member as defined in *Westinghouse Electric.* The counter argument is that he has substantial control with respect to this transaction, but given his inability to effect any substantial change in corporate policy this argument may be subject to attack. These hypotheticals point to another difficulty with the control group test, i.e., uncertainty of application. *See Upjohn,* 449 U.S. at 393.

[39] *See supra* note 11. A compromise position is that the employee directing the communication must actually be authorized to contract for legal services. This proposal is discussed *infra* Section IV.

[40] *Harper & Row,* 423 F.2d at 492.

facts could be protected by the privilege,[41] subsequent authority settles this point.[42] Facts are now clearly subject to discovery whether or not they are communicated to counsel.

Depending on the interpretation of "superior" in the subject matter test, the scope of the privilege available under the test is potentially of extreme breadth. Indeed, if "superior" is given its literal meaning, the test arguably excludes only the lowest employees acting without authority. At a minimum it would appear that the test allows the privilege to be invoked by employees outside of the control group and, consequently, allows broader protection than the control group test.[43] A broader test is preferred because it encourages full disclosure in accordance with the policy basis of the privilege. In particular, the attorney is not limited to receiving information only from members of the control group, who often will not have direct access to the best evidence available.[44]

A criticism of the subject matter test is that it allows a corporation to extend the "zone of silence" merely by having a corporate superior direct that all reports, whether legally significant or not, be passed to counsel, thus giving rise to the privilege.[45] While consistent with the wording of the test, these criticisms appear overstated given the basic definition of the attorney-client privilege and corporate reality. On the latter point, the critics fail to account for the expense involved in obtaining legal advise. Very few rational businessmen would incur the enormous expense of having every document reviewed by counsel in order that privilege may be claimed if, by chance, litigation concerning the document came to pass. Furthermore, if corporate attorneys were required to read every document potentially relevant to litigation, very little time would be left to discharge the primary functions of counsel. As a result, from a business point of view, the lawyer would be inefficiently utilized.

However, even if businessmen could afford to retain banks of attorneys to read documents, privilege claims would nonetheless be thwarted by the basic definition of the privilege. It will be recalled that the definition of the privilege demands that the communication be 1) to a lawyer,

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41 *Id.* at 491.

42 *Upjohn*, 449 U.S. at 395, where it is stated: "The privilege only protects disclosure of communications; it does not protect disclosure of the underlying facts by those who communicated with the attorney . . . ." The Court cites *Westinghouse Electric*, 210 F. Supp. at 831 (the client may not refuse to disclose a relevant fact merely because it was communicated to an attorney); *Diversified Industries v. Meredith*, 572 F.2d at 611; State *ex rel.* Dudek v. Circuit Court, 34 Wis. 2d 559, 580, 150 N.W.2d 387, 399 (1967) (a party may not conceal a fact merely by revealing it to his lawyer). *See also* 8 J. WIGMORE, *supra* note 5 § 2291, at 551; Sedco International v. Cory, 683 F.2d 1201, 1205 (8th Cir. 1982), *cert denied*, 103 S. Ct. 379 (1982).

43 *See supra* notes 34-37 and accompanying text.

44 *See supra* notes 29-30 and accompanying text.

45 *See* Weissenberger, *Towards Precision in the Attorney-Client Privilege for Corporations*, 65 IOWA L. REV. 899, 912 (1980); Note, *supra* note 18, at 676; Note, *Privileged Communications—Inroads on the 'Control Group' Test in the Corporate Arena*, 22 SYRACUSE L. REV. 759, 766 (1971).

2) acting in his professional capacity, 3) for the purpose of obtaining legal advice.[46] If the attorney was merely reading the documents without providing legal services, then neither element (2) nor (3) is met and no privilege attaches.

Partially in response to the concern that the subject matter test could result in overbroad protection, the Eighth Circuit expressly added the legal advice requirement to the test in *Diversified Industries, Inc. v. Meredith*.[47] In that case, an attempt was made to discover memoranda prepared by counsel which concerned allegations that Diversified had bribed the purchasing agents of other corporations. Privilege was claimed and eventually upheld on a hearing *en banc*.[48] After consideration of the privilege, the policy, and the criticisms of the subject matter test, the Court offered the following reformulation:

> [T]he attorney-client privilege is applicable to an employee's communication if (1) the communication was made for the purpose of securing legal advice; (2) the employee making the communication did so at the direction of this corporate superior; (3) the superior made the request so that the corporation could secure legal advice; (4) the subject matter of the communication is within the scope of the employee's corporate duties; and (5) the communication is not disseminated beyond those persons who, because of the corporate structure, need to know its contents.[49]

This test makes explicit the requirement that legal advice must be sought in order to invoke the privilege. It is an improvement on the *Harper & Row*[50] test even if this element was implicit in *Harper & Row*.

A difficulty arising from this requirement, however, is the determination of when legal advice is sought. The Eighth Circuit held that communications submitted to counsel are prima facie for the purpose of obtaining advice, a presumption which is rebutted only by a clear showing to the contrary.[51] Legitimate concern has been expressed with this rule. In particular, the prima facie rule allows excessive invocation of the privilege and, at the same time, it impedes an adversary's ability to challenge the claim.[52]

Furthermore, while a prima facie rule may be justified in most situations, it must be adjusted for corporations. Because application of the privilege could lead to excessively broad claims, claims of privilge must be supported by more than the mere fact that documents have been sub-

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46 8 J. WIGMORE, *supra* note 5, § 2292, at 554.

47 572 F.2d at 606.

48 *Id.*

49 *Id.* at 609.

50 423 F.2d at 491-92.

51 *Diversified Industries, Inc.*, 572 F.2d at 610; McLaughlin, *The Treatment of Attorney-Client Privileges in the Proposed Rules of Evidence for the United States District Courts*, 26 REC. A.B. CITY N.Y. 31 (1971).

52 Note, *supra* note 18, at 678.

mitted to counsel.[53] However, the presumption of *Diversified Industries* destroys the regulatory aspect of this element of the privilege.[54]

In addition, it may be persuasively argued that the prima facie test misconstrues the proper burden for establishing the privilege. Generally, the burden of proving the existence of the privilege rests on the party asserting it.[55] Shifting the burden in *Diversified* is unjustified in that it runs contrary to the general rule of narrow construction[56] and places the burden on the party least able to meet it. The rule also renders meaningless the improvement of the subject matter test in *Diversified* because the claimant will be able to meet the legal advice requirement with a minimal showing that an attorney read the document. The prima facie rule should therefore be abandoned in claims of corporate privilege. Rather, in accord with the general rule, the party asserting the claim should bear the burden of establishing that the communication was for the purpose of obtaining legal advice.[57]

The two tests discussed up to this point, the control group and the subject matter tests, dominated discussion of the corporate privilege prior to *Upjohn*. A few other tests have been proposed, however, and should be briefly commented upon. In *Ampicillin Antitrust Litigation*,[58] neither of the dominant tests were found to be adequate.[59] Rather, Judge Richey proposed the following test:

> 1) The particular employee or representative of the corporation must have made a communication of information which was *reasonably believed to be necessary to the decision-making process* concerning a problem on which legal advice was sought;
> 2) The communication must have been made for the purpose of securing *legal* advice;

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[53] *See supra* text accompanying notes 47 and 49.

[54] *See supra* text accompanying note 47.

[55] S.E.C. v. Gulf & Western Industries, Inc., 518 F. Supp. 675, 682 (D.D.C. 1981) (citing, MCCORMICK ON EVIDENCE § 88 (2d ed. 1972)). *See also* Note, *supra* note 18, at 674. This rule was acknowledged by the Court in *Diversified Industries*, but they allowed the initial burden on the claimant to be met by the minimal showing that the communication was with an attorney. *Diversified Industries*, 572 F.2d at 609.

[56] *See supra* note 11.

[57] The showing could be made at an *in camera* hearing. It is acknowledged that protected information may come into the hands of an adversary in the course of such hearing. While information held to be privileged could not be used directly, the problem of derivative use may arise. *See* Kastigar v. United States, 406 U.S. 441, 460; United States v. Pantone, 634 F.2d 716 (3d Cir. 1980) (both cases deal with the derivative use of immunized testimony but the situation is analogous).

A solution to the problem may be found in the immunity cases. First, the presiding judge could direct that no use of protected information be made with contempt as a possible sanction. Furthermore, if, in a subsequent proceeding it appears that the protected information may have been used then a demand would be made for an affadavit deposing that the information was obtained from independent sources. *See Kastigar*, 406 U.S. at 461; Murphy v. Waterfront Commission, 378 U.S. 52, 79 n.84 (1964).

[58] 81 F.R.D. 377 (D.D.C. 1978).

[59] *Id.* at 384-85.

3) The subject matter of the communication to or from an employee must have related to the performance by the employee of the duties of his employment; and
4) The communication must have been a confidential one . . . .[60]

The improvement suggested by this test is that it removes from consideration the question of which employees qualify as control group members or as directing superiors. Rather, the test focuses the inquiry on "the relevance of the communication to a particular legal problem."[61] In this regard, the test offers a true alternative in that the rank or authority of the employee is irrelevant.

The test may be criticized, however, for its potential overbreadth. The phrasing of the first element of the test may allow any employee's communication to be privileged on behalf of the corporation. This may be of particular concern as the element can be read subjectively, that is, the employee need only convince the court that *he* reasonably believed the communication was necessary at the time it was made. On the other hand, the test provides for a natural limit on claims. Reasonableness tests are necessarily ex post facto and allow the court to substitute its own opinion of reasonableness for that of the employee. In this way the test can at least preclude frivolous claims.

Another possible test has been proposed by Professor Weissenberger[62] who argues that the difficulties with the corporate privilege stem from inappropriate attempts to analogize it to personal privileges.[63] He proposes a test which focuses on the purpose and nature of the communication rather than the position of the communicator.[64] According to Professor Wissenberger's test, the privilege attaches if the communication would not have existed but for the pursuit of legal advice.[65] This test has much to recommend it, including apparent simplicity and the fact that it solves the problem of preexisting documents.[66]

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[60] *Id.* at 385 (emphasis in original).

[61] *Id.*.

[62] Weissenberger, *supra* note 45.

[63] *Id.* at 901.

[64] *Id.* at 919.

[65] *Id.* at 918.

[66] A document does not attract the privilege unless it was created for the express purpose of communicating with counsel. Thus a pre-existing document does not become privileged merely because it is submitted to counsel for his perusal even if he subsequently renders an opinion on its contents. *See* Fisher v. United States, 425 U.S. 391, 403 (1976) in which White, J. stated: "[The privilege] protects only those disclosures— necessary to obtain informed legal advice—which might not have been made absent the privilege." The Court cited In re Horowitz, 482 F.2d 72, 81 (2d Cir. 1973); United States v. Goldfarb, 328 F.2d 280 (8th Cir. 1964). Obviously, this test cannot be met when the document existed before the need to consult counsel arose. *See also* 8 J. WIGMORE, *supra* note 5, § 2291 at 552; § 2307, at 594; § 2308, at 595-96. C. MCCORMICK, EVIDENCE, § 89, at 214 (3d ed. 1984).

The rule is the same in England. *See* The City of Bafoda 1926 W.N. 264 (P.D.A.) (document in question did not come into existence for the purpose of being communicated to counsel and therefore was not privileged).

However, given the development of thought on the corporate privilege the test may be too simple. For instance, can the privilege be raised by any employee? Professor Weissenberger answers this by asserting that implicit in the test is the factual determination that the communication was initiated by someone with sufficient authority to "trigger the legal counselling relationship."[67] If this is in fact implicit, the test begins to merge with the traditional tests with the resultant loss of the attractive simplicity of the test. The merger may not be complete, however, as this test is based on agency rather than position in the corporation. Thus, this test makes the determination of whose communications are privileged more certain, especially if actual authority is demanded.

2. *Upjohn* and After

The article to this point has rehearsed and criticized various American tests for the attachment of the corporate attorney-client privilege. The first of these tests discussed, the control group test, was rejected by the Supreme Court in *Upjohn*.[68] However, that case purports to leave open the test to be applied in the future. In this section the relevant portions of *Upjohn* will be analyzed and criticized. In addition a few post-*Upjohn* cases will be reviewed.

Upjohn concerned a privilege claim raised in response to an Internal Revenue Service summons to produce documents. Auditors for the company discovered evidence of questionable payments made to secure foreign business and reported this fact to general counsel. An investigation, conducted by general counsel and outside counsel, included employee interviews and the completion of questionnaires by employees. A disclosure of the payments was made to the S.E.C. and, as a result, an investigation was commenced by the I.R.S. In the course of the tax investigation a summons was served demanding production of all files generated by counsel in their inquiry into the allegedly illegal payments. The company resisted on the basis of the attorney-client privilege and the work product doctrine.[69] The Sixth Circuit[70] rejected the claims of privilege applying the control group test. The Supreme Court reversed, rejecting that test.[71]

The opinion of the Court, delivered by Justice Rehnquist, is based largely on the policy of the attorney-client privilege discussed earlier in this paper. Emphasis was placed on the perceived need to promote the full disclosure of facts to counsel.[72] After noting the policy behind the

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67 Weissenberger, *supra* note 45, at 922.

68 499 U.S. 383 (1981).

69 *See* Hickman v. Taylor, 329 U.S. 495 (1947).

70 United States v. Upjohn, 600 F.2d 1223 (6th Cir. 1979).

71 Upjohn v. United States, 449 U.S. 383 (1981).

72 *Id.* at 389. Rehnquist, J. stated the policy as follows:

[T]o encourage full and frank communication between attorneys and their clients and thereby promote broader public interest in the observance of law and administration of

privilege, the Court considered corporate realities. It reasoned that the acts of middle and lower employees most often result in legal difficulties for the corporation. It was necessary, then, for counsel to seek information from such employees.[73] Given the importance of such information, the Court rejected the control group test stating:

> The control group test adopted by the court below thus frustrates the very purpose of the privilege by discouraging the communication of relevant information by employees of the client to attorneys seeking to render legal advice to the client corporation. The attorney's advice will also frequently be more significant to non-control group members than to those who officially sanction the advice, and the control group test makes it more difficult to convey full and frank legal advice to the employees who will put into effect the client corporation's policy.[74]

In this context major difficulties with the control group test were perceived. Primarily, the attorney would be handicapped by the denied access to all the facts in cases involving lower echelon employees. However, also of major societal importance is that bona fide attempts at prior compliance with the law could be impeded. If the lawyer's investigatory work product was discoverable against his client, the research and correction of possible violations before they became the subject of litigation would be discouraged.[75]

The rejection of the control group test can be easily defended. The test was overly narrow and the concerns addressed by it largely unjustified.[76] Nonetheless, the judgment in *Upjohn* can be criticized for its failure, indeed refusal, to formulate an appropriate alternative standard for the privilege.[77] This failure was predicated upon Federal Rule of Evidence 501[78] and judicial decisions holding that privileges should be determined on a case-by-case basis.[79] The Court acknowledged that the

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justice. The privilege recognizes that sound legal advice or advocacy serves public ends and that such advice or advocacy depends upon the lawyer's being fully informed by the client.

[73] *Id.* at 391-92. (citing *Diversified Industries v. Meredith*, 572 F.2d at 608-09).

[74] *Upjohn*, 449 U.S. at 392 (citing *Duplan Corp. v. Deering Milliken, Inc.*, 397 F. Supp. at 1164).

[75] *Upjohn*, 449 U.S. at 392.

[76] The main concern was an excessively large "zone of silence." *See supra* text accompanying notes 45-46; Simon, *supra* note 18, at 956.

[77] Burger, C.J., dissented on this point, stating that the Court should have formulated a rule. Despite the Court's refusal to formulate a test, it may be argued that this was in fact done. *See infra* text accompanying notes 88-89.

[78] FED. R. EVID. 501. Rule 501 provides in relevant part:

Except as otherwise required by the Constitution of the United States or provided by Act of Congress or in rules prescribed by the Supreme Court pursuant to statutory authority, the privilege of a witness, person, government, State, or political subdivision thereof shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience.

[79] The Court cites *Trammel v. United States*, 445 U.S. at 47; United States v. Gillock, 445 U.S. 360, 367 (1980).

decision not to formulate a test for the privilege would result in uncertainty, but maintained that any such formulation would be violative of the Rules of Evidence. While a technical reading of Rule 501 and the cases cited supports the decision of the Court, *Upjohn* was nonetheless an appropriate case for an articulation of the common law. Argument on the appropriate standard on which to grant a privilege claim had been made available to the Court[80] and, given the extensive commentary on the issue by the judiciary[81] and academics,[82] it appears that more than adequate information upon which to base an opinion existed. Chief Justice Burger agreed on this point, stating that a standard for the privilege should be advanced by the Court to provide guidance to corporations, counsel and the federal courts.[83]

The Chief Justice, in his concurring judgment,[84] advocated adoption of the subject matter test although he did not identify it as such. Chief Justice Burger proposed the following general rule for the attachment of the privilege:

> [A] communication is privileged at least when, as here, an employee or former employee speaks at the direction of the management with an attorney regarding conduct or proposed conduct within the scope of employment. The attorney must be one authorized by the management to inquire into the subject and must be seeking information to assist counsel in performing any of the following functions: (a) evaluating whether the employee's conduct has bound or would bind the corporation; (b) assessing the legal consequences, if any, of that conduct; or (c) formulating appropriate legal responses to actions that have been or may be taken by others with regard to that conduct.[85]

The similarity of this test with the subject matter test is obvious.[86] However, the Chief Justice speaks of the direction of management rather than the direction of corporate superiors. The phrasing used appears to preclude the argument that any corporate superior can direct the communication.[87]

Chief Justice Burger was alone in his view that a general rule should be articulated. Nonetheless, despite the majority's statement that they would not state a rule,[88] the opinion as precedent may have done exactly

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[80] Chief Justice Burger noted that amici briefs were received from the A.B.A., The American College of Trial Lawyers and 33 law firms in addition to the parties. *Upjohn*, 449 U.S. at 403.

[81] *Id.*

[82] *Id.*

[83] *Id.* at 402.

[84] *Id.*

[85] *Id.* at 403. The Chief Justice cited *Diversified Industries, Inc.*, 572 F.2d 596; *Harper & Row*, 423 F.2d 487; *Duplan Corp.*, 397 F. Supp. 1146

[86] *See supra* text accompanying notes 31-33.

[87] *See supra* text accompanying note 34.

[88] *Upjohn*, 449 U.S. at 396.

that. In holding that the privilege did apply in favor of *Upjohn*, the Court applied the facts to the following standards:

> The communications at issue were made by Upjohn employees to counsel for Upjohn acting as such, at the direction of corporate superiors in order to secure legal advice from counsel . . . . The communications concerned matters within the scope of the employee's corporate duties . . . . Pursuant to explicit instructions from the Chairman of the Board, the communications were considered 'highly confidential' when made . . . and have been kept confidential by the company.[89]

As was the case with Chief Justice Burger's proposal, this reasoning is remarkably similar to what one would expect in an application of the subject matter test. The Supreme Court's statement that it would not provide a definitive test must be taken at face value. However, it is submitted that in future cases reference may be expected to be made to the above quoted factors. While the opinion makes it clear that this is not the only basis for upholding a privilege claim,[90] communications which meet the factors employed by the Supreme Court are, in all likelihood, privileged. Whether we call this a "test" or not is to engage in semantic debate. However, the fact that the Supreme Court emphasized these factors over others which were available defines to some degree the limits of the privilege.

A review of relevant cases decided after *Upjohn* unfortunately does not reveal much reasoned analysis of that case, nor are the opinions particularly helpful in determining whether *Upjohn* in fact certified a modified subject matter test as suggested above. For instance, in *S.E.C. v. Gulf & Western Industries, Inc.*,[91] the court applied the *United Shoe*[92] test, citing *Upjohn* only for the proposition that no specific guidelines for the privilege exist and that claims were to be determined on a case-by-case basis.[93] The cases, however, do make it clear that the privilege can attach regardless of the status of the communicating employee in the corporate hierarchy.[94] This, however, is about the only definitive statement that can be gleaned from the post-*Upjohn* cases. Otherwise, lower courts have adhered to the Supreme Court's view that deterministic standards for the privilege should not be developed, but rather claims must be decided on a case-by-case basis.[95] The result is that recent case decisions

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89 *Id.* at 394-95.

90 *Id.* at 401-02.

91 518 F. Supp. at 681.

92 89 F. Supp. 357 (D. Mass. 1950).

93 *Gulf & Western Industries, Inc.*, 518 F. Supp. at 681.

94 *See In re Grand Jury subpoenas dated Dec. 18, 1981 and Jan. 4, 1982*, 561 F. Supp. at 1253 (employees may get protection irrespective of position); L.S.B. Industries, Inc. v. Commissioner of Internal Revenue, 556 F. Supp. 40, 42 (W.D. Okla. 1982) ("even low level employees may make confidential communications . . . which are covered by the privilege").

95 *See Gulf & Western Industries, Inc.*, 518 F. Supp. at 681.

have been rendered principally on the facts and by the application of basic tests of the specific problems which arise when the claim originates from a corporation.[96]

B. Canadian and English Jurisprudence

Compared to the American development of the corporate attorney-client privilege, treatment of the issue in the United Kingdom and Canada is at best very basic. Anglo-Canadian jurisprudence reveals no development of tests for the attachment of the corporate privilege with the asserted result that the area of protection is overly broad. Rather than examine the role of the employee in giving rise to a privilege, the cases appear to assume that every agent can give rise to the privilege on behalf of his principal, and further to assume that every employee is an agent for the purpose of communicating with counsel.[97] The subsequent lack of analysis results in extremely broad protection for corporate communications.[98] This rule can be easily criticized for its lack of analysis and its apparent violation of the fundamental policy interest in narrow construction of the privilege.[99]

Remarkably, a search of English and Canadian cases reveals only one case where the availability of the privilege to a corporation was challenged. In *Mayor and Corporation of Bristol v. Cox*,[100] the municipality became aware that the president of the local law society intended to publish an opinion that certain land to be sold by the city had defective title. In an action to restrain the publication, disclosure of the city solicitor's opinion on the land was sought and privilege claimed. Apparently, although this is not entirely clear from the reported judgment, an argument was advanced that the privilege could not be claimed by a corporation. This argument was rejected. The court stated:

> [A]s this corporation cannot in its corporate capacity either think or write or act except by certain machinery, which is, so to speak, extraneous to itself, the corporation is perfectly justified in referring all these matters to a committee and asking the committee to deal with them as it would deal with them itself, and they are simply the agents of the corporation for the purpose of considering what ought to be done, and their reports are confidential matters; and under those circumstances those matters are . . . protected.[101]

The same result would probably have been obtained in the United States because the communications were with senior personnel and clearly for the purpose of obtaining advice, in this case an opinion on

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96 *Id.*

97 *See infra* text accompanying notes 101 and 105.

98 *See infra* text accompanying note 117.

99 8 J. WIGMORE, *supra* note 5, § 2291, at 554.

100 26 Ch. D. 678 (1884).

101 *Id.* at 682.

title. However, these factors were not the bases for the decision. Instead the Court assumed, without further analysis, that communications by an agent would give rise to a privilege in favor of his principal.[102] While this is not at odds with the American law,[103] a divergence does arise in the approaches between the jurisdictions in regards to the application of the agency doctrine. As has been demonstrated, American jurisprudence focuses on whether the communicating employee was authorized to make legal communications or was directed to do so by someone so authorized.[104] In non-agency language, the inquiry of the American courts is whether the communicator is sufficiently identified with the corporation to give rise to a corporate privilege. On the other hand, English and Canadian cases appear to assume that every employee is so authorized without further inquiry.[105]

The broad treatment of the privilege in Canada can be illustrated by reference to a number of search cases. In *Re Director of Investigation and Research and Shell Canada Ltd.*,[106] a case involving a search under the Combines Investigation Act,[107] a claim of privilege was raised in respect to all documents within the offices of in-house counsel. It was argued by the government that the documents were subject to seizure and if privileged the proper time to raise the claim was at trial. The court rejected this argument. Notably, however, no inquiry was undertaken into the elements of the privilege to determine whether it in fact attached. Given that the lawyers involved were staff counsel, it is at least possible that many of the documents did not relate to the giving of legal opinions, but rather involved business decisions.[108] Furthermore, even given the wide scope afforded the privilege in Canada, an *in camera* review of the documents may have revealed communications by persons unable to raise the privilege on behalf of the corporation. The fact that essentially no inquiry into the privilege was made by the court leads to a rather uncomfortable result that, in effect, delegates to the corporation sole power to determine the attachment of the privilege.[109]

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[102] *See also* Reid v. Langlois, 1 Mac & G. 627, 41 Eng. Rep. 1408 (1849) (partnership); Bunbury v. Bunbury, 2 Beav. 173, 48 Eng. Rep. 1146 (1839) (agency); Wheeler v. LeMarchant, 17 Ch. D. 675 (Ch. App. 1881) (agency); Anderson v. Bank of British Columbia, 2 Ch. D. 644 (Ch. App. 1876) (agency in *dicta*); Re Alcan-Colony Contracting Ltd. and Minister of National Revenue, 18 D.L.R.3d 32 (Ont. H.C. 1971) (agency).

[103] 8 J. WIGMORE, *supra* note 5, § 2317, at 618.

[104] *See supra* text accompanying notes 24-26 and 31-38.

[105] *See supra* note 101 and accompanying text.

[106] 55 D.L.R.3d 713 (Fed. Ct. App. 1975).

[107] CAN. REV. STAT. ch. C-23 (1970) as amended by CAN. STAT. 1974-75-76, ch. 76.

[108] *See United Shoe*, 89 F. Supp. at 361; Re Presswood v. Int'l Chemalloy Corp., 65 D.L.R.3d 228 (Ont. H.C. 1975); Alfred Compton Amusements v. Comm'r of Customs and Excise, [1973] 2 All E.R. 1169 (H.L.).

[109] The government has proposed an amendment to the Combines Investigation Act which would require a court to review the documents upon which privilege is claimed. Bill C-29, § 6 provides that privilege claims in respect of documents be determined by a judge of the Federal Court or a superior court in a province sitting *in camera*.

A contrasting case is *Re B.X. Development Inc. and the Queen*[110] which involved a claim of privilege in the face of a Criminal Code[111] search warrant. The court held that a warrant could be quashed when it would reach privileged documents but clearly placed the onus on the claiming party to establish the existence of the privilege. Unlike the court in *Shell Canada*, the British Columbia Court of Appeal held that the privilege would not apply merely because a communication was made to a lawyer; rather, all the elements of the privilege had to be established.[112] The court was undoubtedly correct in this view. However, it should be noted that no question arose as to the authority or position of the communicators in the corporation, the court apparently assuming that any employee could make a privileged communication.

The contradiction between the above noted cases may have been resolved in *Solosky v. The Queen.*[113] That case, while not concerned with a corporate claim of privilege, held that the documents must be reviewed by a court to determine whether protection is afforded. The Court stated:

> [P]rivilege can only be claimed document by document, with each document being required to meet the criteria for the privilege— (i) a communication between solicitor and client; (ii) which entails the seeking or giving of legal advice; and (iii) which is intended to be confidential by the parties. To make the decision as to whether the privilege attaches, the letters must be read by the judge, which requires, at a minimum, that the documents be under the jurisdiction of a court.[114]

No issue can be taken with this statement. However, it may have been compromised somewhat in the concurring judgment of Justice Estey, which suggests that the right to discover documents may be abrogated if the attorney makes a statement that the documents contain legal opinions. Judge Estey's opinion could support an argument that *Shell Canada* is affirmed and a court must defer to a lawyer's claim of privilege. *Solosky*, however, must be confined to its specific facts, which did not involve any judicial or quasi-judicial proceeding.[115] A strong argument could therefore be made that the deference suggested by Estey J. arises only in non-judicial proceedings.[116]

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110 70 D.L.R.3d 366 (B.C. Ct. App. 1976).

111 CAN. REV. STAT. ch. C-34, § 443 (1970). Section 443 is the general search warrant provision.

112 *See B.X. Development, Inc.*, 70 D.L.R.3d at 369.

113 1980 S.C.R. 821.

114 *Id.* at 837-38.

115 *Id.* at 838. *Solosky* involved the opening of the mail of inmates of a penitentiary, the purpose being institutional security not the use of the documents in a court or a quasi-judicial proceeding.

116 A review of cases decided after Solosky supports this. *See* Re Gowling & Henderson and the Queen, 136 D.L.R.3d 292 (Ont. H.C. 1982); Gould v. Lumonics Research Ltd., 59 C.P.R.2d 60 (Fed. Ct. T.M. 1981) (documents reviewed individually by trial judge), *rev'd in part* 46 N.R. 483 (Fed. Ct. App. 1983).

Admittedly the Canadian cases briefly noted above do not directly aid any detailed analysis of the privilege in the corporate context. The Anglo-Canadian jurisprudence on the issue develops from the premise that the communication of an agent gives rise to the privilege on behalf of his principal.[117] From this premise it is implicitly assumed that all employees are agents. As a result, the availability of the corporate privilege is extremely broad in England and Canada.

The breadth afforded the privilege in those jurisdictions is extremely difficult to justify. The privilege may be further extended by the argument that courts should defer to an attorney's claim of privilege. It is the position of this author that the corporate privilege in Canada is too wide and consequently should be narrowed. The present breadth of the protection does not accord with the policy of the privilege or with corporate theory. With respect to the former point, it is trite law that the privilege is to be narrowly construed as an exception to the general rule in favor of disclosure.[118] Continued adherence to this rule demands the formulation of a test for the privilege which provides for a detailed analysis of the source of the communication in order that it may be ascertained whether protection is demanded to promote full and frank disclosure to corporate attorneys.

It is also argued that the broad rule does not accord with corporate reality. A corporation must act through agents. However, it is fair to demand that the corporation itself determine the scope of authority of its agents in advance of allowing them to act on behalf of the corporation. The present presumption in Canada that any employee can give rise to a corporate privilege essentially allows post hoc authorization of the communication, thus extending the protection to disclosures which may have been discoverable at the time they were made. As a consequence, the corporation is able to claim that even the lowest employee in the hierarchy speaks for the entity after the nature of the disclosure is determined. In fact, given the breadth of the Canadian privilege, corporations have an incentive to do this. If the disclosures of the employee reveal only the risk of personal liability or are exculpatory, then it is open to the corporation to assert that the particular employee is unauthorized to speak for the entity and therefore that the corporation is not the client within the definition of the privilege. On the other hand, if the employee implicates the corporation, then it may be claimed that since an agency relationship is involved the protection of the privilege extends to the principal.

The rule which permits the principal to claim privilege is not itself unreasonable. However, adjustments are required in the corporate context. It should not be possible for a corporation to claim that every single employee speaks for it in legal matters only after litigation is imminent when the same corporation would disclaim such authority when there is

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[117] *See supra* text accompanying notes 97 and 101.

[118] *See* 8 J. WIGMORE, *supra* note 5, § 2192, at 70.

no threat of litigation. Rather, the extent of the corporate privilege should be coincident either with the ability of a particular employee to involve the entity in litigation or the actual pre-existing authority of the communicating employee or the superior officer who directs the employee to speak with counsel.

IV. PROPOSALS

This review of the American and Anglo-Canadian treatments of the corporate attorney-client privilege has revealed a number of criticisms of both treatments. The main difficulties in the United States at present are uncertainty with the applicable test and interpretive problems with proposed tests. In particular, the opinion in *Upjohn*[119] disclaimed the formulation of a general test and consequently counsel will naturally encounter difficulty in determining whether the privilege attaches. In addition, the dominant tests after the demise of the control group test, the subject matter test as well as the standards employed by the Supreme Court in *Upjohn*, refer to "corporate superiors."[120] This phrase lacks legal definition and contributes to uncertainty. The Anglo-Canadian treatment is flawed because of its extreme overbreadth and lack of analysis of the privilege in the context of policy and bona fide corporate need.[121]

Two tests may solve these problems. The favored proposal is one which would align the corporation's ability to claim privilege on an employee communication with the capacity of that employee to give rise to corporate liability or guilt. This test is theoretically attractive because the area of protection will be co-incident with the corporation's exposure. In addition, the test naturally confines the privilege to communications required to obtain legal advice concerning the liabilities of the corporation.

An alternative test is a modification of the subject matter test which eliminates the uncertainty of who may direct the communication. This test would demand that the directing superior possess actual authority to retain and communicate with counsel. The attractiveness of this test is its high degree of certainty and, as will be argued, a natural incentive to limit the area of protection. The tests will be discussed in order.

The policy of the attorney-client privilege is to promote full disclosure of information by a client to his or her attorney. However, the privilege is constrained by the general rule in favor of pre-trial discovery. A fair method of limiting the corporate privilege on the communication of an employee would be to allow a corporate claim only to the degree to which the particular employee can affect corporate liability. Such an ap-

119 449 U.S. 383 (1981).

120 *See supra* text accompanying notes 34 and 88-90.

121 *See supra* text accompanying notes 97-99.

proach appears to be consistent with the above stated policies as well as with the theory of the corporation.

In addition, the test analogizes the corporate privilege to that available to individuals.[122] The proposed test would be formulated along the following lines: When the acts or statements of an employee may be reasonably regarded as raising the potential of litigation in which the corporate entity will be a party, communications between the employee and an attorney are privileged at the insistence of the corporation. The test thus provides a symmetry between the potential liability and the area of protection. Furthermore, the test is reasonably certain although the objective element allows for post hoc review by the court.

Nonetheless, it will not usually be a difficult task for an attorney to assess potential corporate liability, so he will generally be able to give an opinion on whether the communications are privileged. The test also inherently contains the area of protection—since the protection is coincident with potential liability, only those communications which are relevant to advising the corporation would be privileged. Thus, this "liability" test appears to accord with the rule that privileges should be narrowly construed and meets the need for certainty.

An alternative test which recommends itself is based on agency. Under this test the privilege would attach only if the person making the communication was authorized as an agent by the corporation or was directed by an employee so authorized. Because the concern is legal communications, the authority demanded by the test should be the authority to enter a contract for legal services on behalf of the corporation and must be actual authority.

This test is attractive because of its relative simplicity and because it naturally regulates the invocation of the privilege. With respect to the former point, given the requirement of actual authority, ascertainment of whether the privilege will attach requires only an inquiry into the authority of the communicator or his directing superior. In addition, since corporations may be expected to closely control the retention of counsel, the number of persons given this authority will tend to be limited by economic considerations. While it is not possible to predict how wide the protection would be under this test the rational, cost conscious firm would not grant this requisite authority to more persons than necessary to protect its perceived legitimate legal interests.

Both of the above noted tests possess the advantage of relative simplicity which would aid counsel in determining whether the privilege does attach to the benefit of a corporation. On a theoretical basis the "liability" test is regarded as superior because the area of protection and potential liability will be more or less coincident, thus limiting the privilege to that necessary to defend the corporation. The agency test, on the other hand, may be preferred due to its certainty and the fact that it

122 For an argument that such an analogy is inappropriate *see* Weissenberger, *supra* note 45.

forces the corporation itself to determine the extent of the privilege. It might be argued that this factor will result in overbroad protection, although the potential cost involved in having a large number of persons authorized to retain counsel should restrain the corporation from extending the "zone of silence."

Whichever test is preferred it would properly meet the policy considerations of the attorney-client privilege, since communications which are truly of legal interest to the corporation will invoke protection. In the American court system either of the proposed tests would add much needed certainty in the wake of the refusal of the U.S. Supreme Court to formulate a standard in *Upjohn*. In the Canadian context, the tests would narrow the present corporate privilege, but not excessively so, since protection would be retained for communications which are required in order that the corporation may be properly advised. Additionally, adoption of the tests in Canada would reduce the number of invalid corporate claims of privilege to the benefit of wider and more efficient discovery.

V. CONCLUSIONS

Although the opinion in *Upjohn* properly rejected the control group test as being too narrow, the refusal of the Court to adopt an alternative test will result in confusion and uncertainty in the adjudication of privilege claims. *Upjohn* will allow a broadening of the privilege, though this should not go as far as the English and Canadian treatments which are regarded as overly broad. Rather, attorney-client privilege should be limited in a way that strikes a compromise between the competing policies of disclosure and confidentiality. It is submitted that either the "liability" or the "agency" tests discussed in this article would accomplish that goal.